

## **REMARKS**

Claims 1-9 are now pending in the application. The Examiner is respectfully requested to reconsider and withdraw the rejection(s) in view of the amendments and remarks contained herein.

The Examiner incorrectly refused to consider the references that were cited by Applicants on November 27, 2002. Applicants have not cited "largely irrelevant" material as claimed by the Examiner. Applicant cited the patents and/or publications after receiving these references during the prosecution of applications that are related to the present invention. As used in the previous sentence, "related" means that these other applications describe and claim various related aspects of segmented switched reluctance machines. As for being irrelevant, Applicants believe that the fact that a patent examining authority cites these references in a related case is conclusive on the issue of relevance from a duty of disclosure stand point. Under 37 C.F.R 1.56, it is Applicant's duty to cite these references. Likewise, Applicants assert that it is the Examiner's duty to consider these references. Therefore, Applicants respectfully request the Examiner to reconsider the refusal and to consider the submitted prior art.

As for the Examiner's reliance upon U.S. Patent No. 6,487,769, this patent issued after the filing date of the present invention and is commonly assigned to Emerson Electric Co. Therefore, this patent is not prior art.

The Examiner has also relied upon Garcia '530 for the proposition that segmented stator switched reluctance machines are known. While the stator of Garcia '530 is segmented, each stator segment defines two stator poles. Claim 1 is now

restricted to stator segment assemblies that include a stator core that defines a single stator pole.

This difference is very important. The partially segmented stator construction of Garcia '530 has many of the same problems that non-segmented stators have. The partially segmented stator of Garcia '530 needs to be wound using needle winding or transfer winding methods, which will inherently provide a lower slot fill. Furthermore, the electrical characteristics (such as the inductance and resistance of the stator poles) will not be as uniform as those that can be obtained using Applicants fully segmented approach. Therefore, using sensorless rotor position sensing will likely be more difficult to implement and/or will likely provide less accurate rotor position information.

#### **REJECTION UNDER 35 U.S.C. § 103**

Applicants traverse the rejection of Claims 1-9 under 35 U.S.C. § 103(a) as being unpatentable over Tang (U.S. Pat. No. 5,929,590) in view of Muller (U.S. Pat. No. 4,698,542) and Yamazaki (U.S. Pat. No. 6,127,753).

None of the references show, teach or suggest a fan assembly including a fan and a switched reluctance motor including a stator with circumferentially-spaced stator segment assemblies each defining a single stator pole.

The Examiner incorrectly states that "Tang shows a machine comprising a switched reluctance motor that includes a shaft where said switched reluctance **fan** motor includes ..." **Final Office Action at p. 3.** The text of Tang does not discuss the use of the switched reluctance motor in a fan.

In prior Office Actions, the Examiner expressly admitted that Tang does not show, teach or suggest a fan and a shaft connected to the fan. The Examiner also expressly admitted that Tang does not show, teach or suggest a stator of a switched reluctance machine including a plurality of circumferentially-spaced stator segment assemblies.

While Muller shows a fan and a shaft connected to the fan, the Examiner tacitly admitted that Muller does not show, teach or suggest a switched reluctance machine or a segmented stator.

The Examiner incorrectly asserted that Yamazaki “shows a **switched reluctance fan** motor including a stator including a plurality of circumferentially-spaced stator segment assemblies that include a stator segment core and winding wire wound around the stator segment core for the purpose of decreasing size.” **Final Office Action at p. 4.** Contrary to the Examiner’s statements, Applicants respectfully assert that Yamazaki et al. discloses a stator for a permanent magnet motor and does not mention the use of the disclosed stator in fan motors. Yamazaki also does not state that the segmented stator is suitable for switched reluctance machines. Applicants pointed out these incorrect statements to the Examiner in Applicant’s prior response.

In essence, using Applicants specification as a guide, the Examiner has found the features of the present invention in three separate references. The Examiner then selected certain of the features from each of the references and then combined them. The Examiner’s basis for making the combination is the fact that all of the references “are all from the same field of endeavor; the purpose disclosed by one inventor would have been recognized by the pertinent art of the others.” **Final Office Action at p.4.**

Applicants assert that, without Applicants' specification, the Examiner would not have made such a combination.

The motivation for segmenting the stator was to allow the stator segments to be wound more precisely so that the electrical characteristics of the stator segment assemblies would be more uniform. This, in turn, allows sensorless rotor position sensing to be implemented more readily. Yamazaki et al. is completely silent on the issue of switched reluctance machines, rotor position sensing and/or sensorless drive circuits. Tang is completely silent with respect to the desirability of segmenting the stator of a switched reluctance machine. While Yamazaki et al. segmented the stator of a permanent magnet motor to reduce size, the problem of reducing the size of the switched reluctance machine is not even discussed in Tang or Miller.

The sole motivation for making the proposed combination is provided by Applicants' specification, which is impermissible hindsight reconstruction. As succinctly stated by the CAFC:

But this court has said, "To imbue one of ordinary skill in the art with knowledge of the invention in suit, when no prior art reference or references of record convey or suggest that knowledge, is to fall victim to the insidious effect of a hindsight syndrome wherein that which only the inventor taught is used against its teacher." W. L. Gore , 721 F.2d at 1553, 220 USPQ at 312-13. It is essential that "the decisionmaker forget what he or she has been taught at trial about the claimed invention and cast the mind back to the time the invention was made . . . to occupy the mind of one skilled in the art who is presented only with the references, and who is normally guided by the then-accepted wisdom in the art." Id . One cannot use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention.

**In re Fine**, 5 U.S.P.Q.2d, 1596, 1600 (CAFC 1988).

For these reasons, Applicants assert that Claim 1 is allowable over the prior art of record.

Referring now to Claim 9, none of the references teach a segmented stator for a switched reluctance machine having projections that extend from a radially inner surface of the tooth section have a width  $W_2$  that is substantially greater than a width of the tooth section  $W_1$ . The tooth sections of switched reluctance machines have generally had parallel side surfaces to allow windings to be placed using the needle and transfer winding methods.

For this reason, Applicants assert that Claim 9 is allowable over the prior art of record.

Referring now to Claim 26, none of the references teach an end cap assembly including first and second end caps connected to opposite axial ends of the stator segment core and a first end cap retainer section that connects the first and second end caps, wherein the winding wire is wound around the first and second end caps and the stator core, and wherein the end cap assembly is not located between radial side surfaces of the tooth section and the winding wire.

The advantages of using an end cap assembly that is not located between radial side surfaces of the tooth section and the windings includes increased slot fill. If the end cap assembly is located between the windings and the radial side surfaces of the tooth, the winding area is reduced. The first end cap retainer section provides additional winding wire retention and increase the strength of the end cap assembly.

For this reason, Applicants assert that Claim 26 is allowable over the prior art of record.

The remaining Claims 2-8 and 27 are either directly or indirectly dependent upon Claim 1 and are allowable for the reasons set forth above.

**CONCLUSION**

It is believed that all of the stated grounds of rejection have been properly traversed, accommodated, or rendered moot. Applicant therefore respectfully requests that the Examiner reconsider and withdraw all presently outstanding rejections. It is believed that a full and complete response has been made to the outstanding Office Action, and as such, the present application is in condition for allowance. Thus, prompt and favorable consideration of this amendment is respectfully requested. If the Examiner believes that personal communication will expedite prosecution of this application, the Examiner is invited to telephone the undersigned at (248) 641-1600.

Respectfully submitted,

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In re Fine (CA FC) 5 USPQ2d 1596

**In re Fine**

**U.S. Court of Appeals Federal Circuit  
5 USPQ2d 1596**

**Decided January 26, 1988  
No. 87-1319**

**Headnotes**

**PATENTS**

**1. Patentability/Validity -- Obviousness -- Evidence of (§ 115.0903)**

Patent and Trademark Office improperly rejected claimed invention for obviousness since nothing in cited references, either alone or in combination, suggests or teaches claimed invention, since there is consequently no support for PTO's conclusion that substitution of one type of detector for another in prior art system, resulting in claimed invention, would have been obvious, and since PTO therefore failed to satisfy its burden of establishing prima facie case of obviousness by showing some objective teaching or generally available knowledge that would lead one skilled in art to combine teachings of existing references.

**2. Patentability/Validity -- Obviousness -- In general (§ 115.0901)**

Obviousness is tested by what combined teachings of prior art references would have suggested to those of ordinary skill in art, not by whether particular combination of elements from such references might have been "obvious to try."

**3. Patentability/Validity -- Obviousness -- Evidence of (§ 115.0903)**

Patent and Trademark Office erred, in rejecting as obvious system for detecting and measuring minute quantities of nitrogen compounds, by failing to recognize that appealed claims can be distinguished over combination of prior art references, in view of evidence demonstrating that prior art does not teach claimed temperature range, despite some overlap of preferred temperature ranges for claimed invention and prior art, since purposes of preferred temperature ranges are different and overlap is mere happenstance.

**4. Patentability/Validity -- Obviousness -- In general (§ 115.0901)**

Dependent claims are non-obvious under 35 USC 103 if claims from which they depend are non-obvious.

**Case History and Disposition:**

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Appeal from the U.S. Patent and Trademark Office Board of Patent Appeals and Interferences.

Application for patent by David H. Fine, Serial No. 512,374. From decision of Board of Patent Appeals and Interferences affirming rejection of application, applicant appeals. Reversed; Smith, circuit judge, dissenting with opinion.

**Attorneys:**

Morris Relson and Darby & Darby, New York, N.Y., (Beverly B. Goodwin with them on the brief) for appellant.

Lee E. Barrett, associate solicitor, Arlington, Va., (Joseph F. Nakamura, solicitor, and Fred E. McKelvey, deputy solicitor, with him on the brief) for appellee.

**Judge:**



Before Friedman, Smith, and Mayer, circuit judges.

## **Opinion Text**

### **Opinion By:**

Mayer, J.

David H. Fine appeals from a decision of the Board of Patent Appeals and Interferences of the United States Patent and Trademark Office (Board) affirming the rejection of certain claims of his application, Serial No. 512,374, and concluding that his invention would have been obvious to one of ordinary skill in the art and was therefore unpatentable under 35 U.S.C. §103. We reverse.

## **Background**

### **A. The Invention .**

The invention claimed is a system for detecting and measuring minute quantities of nitrogen compounds. According to Fine, the system has the ability to detect the presence of nitrogen compounds in quantities as minute as one part in one billion, and is an effective means to detect drugs and explosives, which emanate nitrogen compound vapors even when they are concealed in luggage and closed containers.

The claimed invention has three major components: (1) a gas chromatograph which separates a gaseous sample into its constituent parts; (2) a converter which converts the nitrogen compound effluent output of the chromatograph into nitric oxide in a hot, oxygen-rich environment; and (3) a detector for measuring the level of nitric oxide. The claimed invention's sensitivity is achieved by combining nitric oxide with ozone to produce nitrogen dioxide which concurrently causes a detectable luminescence. The luminescence, which is measured by a visual detector, shows the level of nitric oxide which in turn is a measure of nitrogen compounds found in the sample. The appealed claims were rejected by the Patent and Trademark Office (PTO) under 35 U.S.C. §103. Claims 60, 63, 77 and 80 were rejected as unpatentable over Eads, Patent No. 3,650,696 (Eads) in view of Warnick, et al., Patent No. 3,746,513 (Warnick). Claims 62, 68, 69, 79, 85 and 86 were rejected as unpatentable over Eads and Warnick in view of Glass, et al., Patent No. 3,207,585 (Glass).

### **B. The Prior Art .**

#### **1. Eads Patent .**

Eads discloses a method for separating, identifying and quantitatively monitoring sulfur compounds. The Eads system is used primarily in "air pollution control work in the scientific characterization of odors from sulfur compounds."

The problem addressed by Eads is the tendency of sulfur compounds "to adhere to or react with the surface materials of the sampling and analytical equipment, and/or react with the liquid or

gaseous materials in the equipment." Because of this, the accurate

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cy of measurement is impaired. To solve the problem, the Eads system collects an air sample containing sulfur compounds in a sulfur-free methanol solution. The liquid is inserted into a gas chromatograph which separates the various sulfur compounds. The compounds are next sent through a pyrolysis furnace where they are oxidized to form sulfur dioxide. Finally, the sulfur dioxide passes through a measuring device called a microcoulometer which uses titration cells to calculate the concentration of sulfur compounds in the sample.

## **2. Warnick Patent .**

Warnick is directed to a means for detecting the quantity of pollutants in the atmosphere. By measuring the chemiluminescence of the reaction between nitric oxide and ozone, the Warnick device can detect the concentration of nitric oxide in a sample gaseous mixture.

Warnick calls for "continuously flowing" a sample gaseous mixture and a reactant containing ozone into a reaction chamber. The chemiluminescence from the resulting reaction is transmitted through a light-transmitting element to produce continuous readouts of the total amount of nitric oxide present in the sample.

## **3. Glass Patent.**

The invention disclosed in Glass is a device for "completely burning a measured amount of a substance and analyzing the combustion products." A fixed amount of a liquid petroleum sample and oxygen are supplied to a flame. The flame is then spark-ignited, causing the sample to burn. The resulting combustion products are then collected and measured, and from this measurement the hydrogen concentration in the sample is computed.

## **C. The Rejection .**

The Examiner rejected claims 60, 63, 77 and 80 because "substitution of the [nitric oxide] detector of Warnick for the sulfur detector of Eads would be an obvious consideration if interested in nitrogen compounds, and would yield the claimed invention." He further asserted that "Eads teaches the [claimed] combination of chromatograph, combustion, and detection, in that order. . . . Substitution of detectors to measure any component of interest is well within the skill of the art." In rejecting claims 62, 68, 69, 79, 85 and 86, the Examiner said, "Glass et al. teach a flame conversion means followed by a detector, and substitution of the flame conversion means of Glass et al. for the furnace of Eads would be an obvious equivalent and would yield the claimed invention." The Board affirmed the Examiner's rejection.

## **Discussion**

### **A. Standard of Review .**

Obviousness under 35 U.S.C. §103 is " 'a legal conclusion based on factual evidence.' "

*Stratoflex, Inc. v. Aeroquip Corp.* , 713 F.2d 1530, F.2d 1530, 1535, 218 USPQ 871, 876 (Fed. Cir. 1983) (quoting *Stevenson v. Int'l Trade Comm'n* , 612 F.2d 546, 549, 204 USPQ 276, 279 (CCPA 1979) ). Therefore, an obviousness determination is not reviewed under the clearly erroneous standard applicable to fact findings, *Raytheon Co. v. Roper Corp.* , 724 F.2d 951, 956, 220 USPQ 592, 596 (Fed. Cir. 1983); it is "reviewed for correctness or error as a matter of law." *In re De Blauwe* , 736 F.2d 699, 703, 222 USPQ 191, 195 (Fed. Cir. 1984).

To reach a proper conclusion under §103, the decisionmaker must step backward in time and into the shoes worn by [a person having ordinary skill in the art] when the invention was unknown and just before it was made. In light of *all* the evidence, the decisionmaker must then determine whether . . . the claimed invention as a whole would have been obvious at *that* time to *that* person. 35 U.S.C. §103. The answer to that question partakes more of the nature of law than of fact, for it is an ultimate conclusion based on a foundation formed of all the probative facts.

*Panduit Corp. v. Dennison Mfg. Co.* , 810 F.2d 1561, 1566, 1 USPQ2d 1593, 1595-96 (Fed. Cir. 1987).

### **B. *Prima Facie* Obviousness .**

Fine says the PTO has not established a *prima facie* case of obviousness. He contends the references applied by the Board and Examiner were improperly combined, using hindsight reconstruction, without evidence to support the combination and in the face of contrary teachings in the prior art. He argues that the appealed claims were rejected because the PTO thought it would have been "obvious to try" the claimed invention, an unacceptable basis for rejection.

[1] We agree. The PTO has the burden under section 103 to establish a *prima facie* case of obviousness. See *In re Piasecki* , 745 F.2d 1468, 1471-72, 223 USPQ 785, 787-87 (Fed. Cir. 1984). It can satisfy this burden only by showing some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that individual to combine the relevant teachings of the references. *In re Lalu* , 747 F.2d 703, 705, 223 USPQ 1257, 1258 (Fed. Cir. 1984); see also *Ashland Oil, Inc. v. Delta Resins & Refractories, Inc.* ,

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776 F.2d 281, 297 n.24, 227 USPQ 657 , 667 n.24 (Fed. Cir. 1985); *ACS Hosp. Sys., Inc. v. Montefiore Hosp.* , 732 F.2d 1572, 1577, 221 USPQ 929, 933 (Fed. Cir. 1984). This it has not done. The Board points to nothing in the cited references, either alone or in combination, suggesting or teaching Fine's invention.

The primary basis for the Board's affirmance of the Examiner's rejection was that it would have been obvious to substitute the Warnick nitric oxide detector for the Eads sulfur dioxide detector in the Eads system. The Board reiterated the Examiner's bald assertion that "substitution of one type of detector for another in the system of Eads would have been within the skill of the art," but neither of them offered any support for or explanation of this conclusion.

Eads is limited to the analysis of sulfur compounds. The particular problem addressed there is the difficulty of obtaining precise measurements of sulfur compounds because of the tendency of sulfur dioxide to adhere to or react with the sampling analytic equipment or the liquid or gaseous

materials in the equipment. It solves this problem by suggesting that the gaseous sample containing sulfur compounds be absorbed into sulfur-free methanol and then inserted into a gas chromatograph to separate the sulfur compounds.

There is no suggestion in Eads, which focuses on the unique difficulties inherent in the measurement of sulfur, to use that arrangement to detect nitrogen compounds. In fact, Eads says that the presence of nitrogen is undesirable because the concentration of the titration cell components in the sulfur detector is adversely affected by substantial amounts of nitrogen compounds in the sample. So, instead of suggesting that the system be used to detect nitrogen compounds, Eads deliberately seeks to avoid them; it warns against rather than teaches Fine's invention. *See W. L. Gore & Assoc. v. Garlock, Inc.*, 721 F.2d 1540, 1550, 220 USPQ 303, 311 (Fed. Cir. 1983) (error to find obviousness where references "diverge from and teach away from the invention at hand"). In the face of this, one skilled in the art would not be expected to combine a nitrogen-related detector with the Eads system. Accordingly, there is no suggestion to combine Eads and Warnick.

Likewise, the teachings of Warnick are inconsistent with the claimed invention, to some extent. The Warnick claims are directed to a gas stream from engine exhaust "continuously flowing the gaseous mixtures into the reaction chamber" to obtain "continuous readouts" of the amount of nitric oxide in the sample. The other words, it contemplates measuring the total amount of nitric oxide in a continuously flowing gaseous mixture of unseparated nitrogen constituents. By contrast, in Fine each nitrogen compound constituent of the gaseous sample is retained in the Chromatograph for an individual time period so that each exists in discrete, time-separated pulses. \* By this process, each constituent may be both identified by its position in time sequence, and measured. The claimed system, therefore, diverges from Warnick and teaches advantages not appreciated or contemplated by it.

Because neither Warnick nor Eads, alone or in combination, suggests the claimed invention, the Board erred in affirming the Examiner's conclusion that it would have been obvious to substitute the Warnick nitric oxide detector for the Eads sulfur dioxide detector in the Eads system. *ACS Hosp. Sys.*, 732 F.2d at 1575-77, 221 USPQ at 931-33. The Eads and Warnick references disclose, at most, that one skilled in the art might find it obvious to try the claimed invention. But whether a particular combination might be "obvious to try" is not a legitimate test of patentability. *In re Geiger*, 815 F.2d 868, 688, 2 USPQ2d 1276, 1278 (Fed. Cir. 1987); *In re Goodwin*, 576 F.2d 375, 377, 198 USPQ 1, 3 (CCPA 1978).

[2] Obviousness is tested by "what the combined teachings of the references would have suggested to those of ordinary skill in the art." *In re Keller*, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981). But it "cannot be established by combining the teachings of the prior art to produce the claimed invention, absent some teaching or suggestion supporting the combination." *ACS Hosp. Sys.*, 732 F.2d at 1577, 221 USPQ at 933. And "teachings of references can be combined *only* if there is some suggestion or incentive to do so." *Id.* Here, the prior art contains none.

Instead, the Examiner relies on hindsight in reaching his obviousness determination.

But this court has said, "To imbue one of ordinary skill in the art with knowledge of the invention in suit, when no prior art reference or references of record convey or suggest that knowledge, is to fall victim to the insidious effect of a hindsight syndrome wherein that which only the inventor taught is used against its teacher." *W. L. Gore* , 721 F.2d at 1553, 220 USPQ at 312-13. It is essential that "the decisionmaker forget what he or she has been taught at trial about the claimed invention and cast the mind back to the time the invention was made . . . to occupy the mind of one skilled in the art who is presented only with the references, and who is normally guided by the then-accepted wisdom in the art." *Id* . One cannot use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention.

### **C. Advantage Not Appreciated by the Prior Art .**

[3] The Board erred not only in improperly combining the Eads and Warnick references but also in failing to appreciate that the appealed claims can be distinguished over that combination. A material limitation of the claimed system is that the conversion to nitric oxide occur in the range of 600°C to 1700°C. The purpose of this limitation is to prevent nitrogen from other sources, such as the air, from being converted to nitric oxide and thereby distorting the measurement of nitric oxide derived from the nitrogen compounds of the sample.

The claimed nitric oxide conversion temperature is not disclosed in Warnick. Although Eads describes a preferred temperature of 675°C to 725°C, the purpose of this range is different from that of Fine. Eads requires the 675°C to 725°C range because it affords a temperature low enough to avoid formation of unwanted sulfur trioxide, yet high enough to avoid formation of unwanted sulfides. Fine's temperature range, in contrast, does not seek to avoid the formation of sulfur compounds or even nitrogen compounds. It enables the system to break down the nitrogen compounds of the sample while avoiding the destruction of background nitrogen gas. There is a partial overlap, of course, but this is mere happenstance. Because the purposes of the two temperature ranges are entirely unrelated, Eads does not teach use of the claimed range. *See In re Geiger* , 815 F.2d at 688, 2 USPQ2d at 1278. The Board erred by concluding otherwise.

### **D. Unexpected Results .**

Because we reverse for failure to establish a *prima facie* case of obviousness, we need not reach Fine's contention that the Board failed to accord proper weight to the objective evidence of unexpected superior results. *Id* .

### **E. The "Flame" Claims .**

[4] Claims 62, 68, 69, 79, 85 and 86 relate to the oxygen-rich flame conversion means of the claimed invention. These "flame" claims depend from either apparatus claim 60 or method claim 77. Dependent claims are nonobvious under section 103 if the independent claims from which they depend are nonobvious. *Hartness Int'l, Inc. v. Simplimatic Eng'g Co .* , 819 F.2d 1100, 1108, 2 USPQ2d 1826, 1831 (Fed. Cir. 1987); *In re Abele* , 684 F.2d 902, 910, 214 USPQ 682, 689

(CCPA 1982); *see also In re Sernaker*, 702 F.2d 989, 991, 217 USPQ 1, 3 (Fed. Cir. 1983). In view of our conclusion that claims 60 and 77 are nonobvious, the dependent "flame" claims are also patentable.

### **Conclusion**

The Board's decision affirming the Examiner's rejection of claims 60, 62, 63, 68, 69, 77, 79, 80, 85 and 86 of Fine's application as unpatentable over the prior art under 35 U.S.C. §103 is **REVERSED**.

### **Footnotes**

Footnote \*. The Solicitor argues that the contents of Attachment C of Fine's brief were not before the Board and may not properly be considered here. However, we need not rely on Attachment C. It is merely illustrative of the qualitative separation of nitrogen compounds which occurs in Fine's system. The fact that the various constituents exit at discrete intervals is shown by the specification which was before the Board and which may appropriately be considered on appeal. *See, e.g., Astra-Sjuco, A.B. v. United States Int'l Trade Comm'n*, 629 F.2d 682, 686, 207 USPQ 1, 5 (CCPA 1980) (claims must be construed in light of specification).

### **Dissenting Opinion Text**

#### **Dissent By:**

Smith, circuit judge, dissenting.

I respectfully dissent. I am of the firm belief that the prior art references, relied upon by the PTO to establish its prima facie case of obviousness, in combination teach and suggest Fine's invention to one skilled in the art. Also, I firmly believe that Fine failed to rebut the PTO's prima facie case. On this basis, I would affirm the board's determination sustaining the examiner's rejection, pursuant to 35 U.S.C. §103, of Fine's claims on appeal before this court.

**- End of Case -**